No. 87-1348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
Petitioner,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a court may enter a preliminary injunction to restrain a carrier from unilaterally changing working conditions in violation of the status quo requirements of the Railway Labor Act without applying the traditional equitable standards used in actions between private parties.

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COUNTER-STATEMENT OF FACTS

Prior to April 24, 1986, the Chicago and North Western Transportation Company (CNW) had never regulated, under its Rule G, employee alcohol and drug use while off duty and off company property. (J.A. 67).[1] There had been a Rule G in place since at least 1953. Over that period of time, there had been one minor change in the Rule itself. In addition, in the early 1970's, the CNW had implemented a Rule G (Addition) which regulated the use of prescription medicine while on duty. (J.A. 24-29).

[1](J.A. —) indicates page citations to the Joint Appendix.

On April 27, 1986, the CNW unilaterally implemented a new Rule G which expressly prohibited off duty drug use, sale or possession. (J.A. 30). The Brotherhood of Maintenance of Way Employes (BMWE) represents track maintenance employees of the CNW. In a letter to the CNW of May 27, 1986, Stan Waldeier, the General Chairman of the Chicago and North Western System Federation of the BMWE, confirmed his earlier verbal protest of the unilateral change in the rule. (J.A. 89-90).

On June 17, 1986, maintenance of way employee Michael B. White was arrested by civil authorities in Minnesota for alleged possession of marijuana. At the time, White was off duty. (J.A. 98). On June 18, 1986, White's wife informed his supervisor at CNW, R. J. Lewis, of his arrest for drug possession. (J.A. 97). On June 19, 1986, White telephoned Lewis and told him of his arrest. Lewis told White to return to work the next day. (J.A. 98). Lewis then contacted CNW's Assistant Division Manager — Engineering who told him to remove White from service because of "our new Rule G." (J.A. 98). Based on this rule, White was suspended pending an investigation when he came to work on June 20, 1986. (J.A. 97). The CNW thereafter sent White a notice of the investigation which specified the charge as "your responsibility for violation of Rule G . . . effective 4/27/86." (J.A. 92).

The next day, June 21, 1986, White voluntarily submitted to a urinalysis drug screen through his personal physician. (J.A. 105). The test results were negative. (J.A. 112).

The hearing on the charges against White was held on July 22, 1986. (J.A. 95). At the hearing, Lewis conceded that White was off duty when the alleged violation of the new Rule G occurred. (J.A. 98). He admitted that, after being informed of White's arrest for drug possession, he told White to return to work. (J.A. 98).

On examination by the General Chairman Waldeier, Lewis testified about the difference between the "new" and the "old"

Rule G. According to Lewis, the difference was contained in the last paragraph of the new Rule which Lewis then read into evidence as follows:

> It's the last paragraph of the new Rule G. It says, "the illegal use, illegal possession or illegal sale of any drug by employees while on or off duty is prohibited." (J.A. 98).

Donald Mundth, CNW's Inspector of Police at St. Paul, introduced the criminal complaint filed against White.[2] He then testified that the charges filed against White by civil authorities would violate the last paragraph of the new Rule G even though White had not been adjudicated guilty of the charge. (J.A. 100). CNW officials then questioned White about his knowledge of the new Rule G. White testified that he had not been issued a new Timetable or Book of Rules. (J.A. 102). R. F. Erwin, CNW's Trainmaster, then asked White to read the new Rule G into the record and asked him if the charges against him would constitute a violation of the new Rule. (J.A. 102-103). No independent evidence that White had possessed drugs was introduced. White denied the charges. (J.A. 103).

Following the investigation, White was discharged effective July 25, 1986 for "violation of Rule G, as contained in Timetable No. 8, effective 4/27/86. . . ." (J.A. 91).

In the meantime, on July 18, 1986, the BMWE had filed an action for status quo injunction and, on July 28, 1986, moved for a preliminary injunction. (J.A. 2).

The CNW filed a Motion to Dismiss, supported by the August 1, 1986 Affidavit of Ronald Cuchna, Vice President of Labor Relations for the CNW. In this Motion, CNW's position was that it has unilaterally changed its drug and alcohol rules five times over a 76 year period and therefore, past practice

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[2] According to the complaint, about two ounces of marijuana had been found under the seat of the car White was driving. The car was registered in the name of his wife. (J.A. 109).

entitled it to continue to change working conditions without interference from the union.[3]

At the initial hearing on August 14, 1986, the court heard arguments on the BMWE's Motion for Preliminary Injunction and on the CNW's Motion to Dismiss. The court listened to arguments from counsel on what was basically an undisputed set of facts. During CNW's argument, the trial court suggested that the parties attempt to negotiate a settlement of the dispute and scheduled a continuation of the hearing for September 23, 1986.

When the hearing reconvened, the trial court did not permit the BMWE to introduce evidence through oral testimony.[4] Instead, he developed the record through stipulations of counsel, through answers of counsel to pointed questions and on the basis of submitted documents. These documents included the existing and "new" Rule G, BMWE's letter protesting the unilateral change, copies of former CNW rules regulating drug and alcohol conduct, the Affidavit of Cuchna and the transcript of the investigation hearing of Michael White.

The trial court asked counsel for CNW if there was any evidence that any employee had ever been disciplined under

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[3]This position was supported by Cuchna's statements in the Affidavit, which were clearly hearsay, that the CNW's drug rule had been unilaterally changed by the CNW in 1929, 1953, 1967, 1975 and 1980. Cuchna had been with the CNW for 14 years. In their appellate pleadings, the CNW admitted that Mr. Cuchna was wrong about the date and the circumstances of the rule change he said occurred in 1975. In fact, the CNW had changed its rule with respect to prescription drugs in 1971. Following a protest by the United Transportation Union, the CNW modified the rule in 1972 to address the union's concerns. There was no rule change in 1975.

[4]Contrary to the assertion in Petitioner's Statement, BMWE's counsel never "dropped" the request to present additional evidence. In fact, the trial court had read the submission of the parties and was aware of the operative facts. BMWE's counsel informed the court what evidence he intended to introduce. On several occasions, the trial court obtained CNW's stipulation that the documentary evidence was authentic and that the facts were not in dispute. (Tr. 9/23/86, pp. 5-7, 18-22).

Rule G's pre-1953 predecessors for conduct occurring off duty. Counsel answered in the negative. (Tr. 9/23/86, p. 10).

The CNW admitted that it could not have disciplined White under Rule G as it existed prior to April 27, 1986. (J.A. 68). This, of course, was obvious under the circumstances of White's suspension, the facts adduced at the investigation hearing, and the emphasis placed on "our new Rule G" by the CNW at the hearing. (J.A. 93, 94, 95, 96, 97, 98, 100, 101, 102, 103).

The trial court also posed a question to CNW's attorney on whether a situation where an employee "participated in delivering" controlled substances while off duty was covered by any company rule. Counsel answered "I don't believe we ever had a rule as such. . . ." (Tr. 9/23/86, pp. 9-10).[5]

After hearing counsel's arguments, the court made specific findings of fact and concluded that the unilateral and formal change in Rule G to, for the first time, prohibit conduct occurring off duty and off company property, constituted a major dispute. The court then granted BMWE's Motion for a Preliminary Injunction. (Tr. 9/23/86, pp.27-35). In a subsequent telephone conference regarding the amount of the appeal bond, CNW's counsel had difficulty articulating any injury to CNW during the pendency of the action and suggested a nominal bond. (Tr. 9/23/86, pp. 38-39).

On October 7, 1986, after retaining present counsel of record, CNW filed a Motion for Reconsideration. For the first time, CNW argued that its new Rule G was simply a "procedural" codification of its existing Rule 7. Rule 7 had not been mentioned in CNW's Motion to Dismiss, in its supporting Brief, in Cuchna's August 1, 1986 Affidavit or during either of the hearings on the Motion. On October 9, 1986, the Court

[5]Later in the hearing, CNW's counsel pointed out to the court that an employee of the CNW purportedly had been disciplined for selling marijuana to minors off duty and off company premises. A review of the award referenced by counsel revealed no indication that the conduct had been off duty and no indication of the substance of the rule applied. The cited case did not involve an employee of the BMWE.

entered an Order granting BMWE's Motion for a Preliminary Injunction and denying CNW's Motion to Dismiss. On October 17, 1986, the trial court denied CNW's Motion for Reconsideration.

On appeal, in addition to the arguments made to the trial court, CNW argued that injunctive relief was improper because there had not been a showing of irreparable harm. The court of appeals rejected CNW's "past practice"and "codification of Rule 7" arguments. 827 F.2d at 335 and 336. The court also referred to the longstanding precedent in the Eighth Circuit that, when a major dispute exists under the Railway Labor Act, preliminary injunctive relief is mandatory without regard to the equities. 827 F.2d at 33, n.2.

The CNW now petitions the Court for a Writ of Certiorari on the issue of the standard to be applied to such an injunction. The BMWE files this Brief in Opposition.

REASONS FOR NOT GRANTING THE WRIT

The issue raised in CNW's Petition is whether a trial court must apply traditional equitable standards before issuing a preliminary injunction maintaining the status quo as required by the Railway Labor Act. Because the statutory duty to maintain the status quo is central to the Act's design and because it incorporates a Congressional determination that national labor policy would otherwise be undermined, the answer is clearly that traditional equitable principles need not be applied. If federal labor policy is not to be jeopardized, courts must be able to maintain the status quo by injunction without regard to the equitable standards applicable to litigation between private parties.

The status quo provisions of the Railway Labor Act are found in Sections 5, 6 and 10 of the Act, 45 U.S.C. §§ 155, 156 and 160. These provisions, taken together, require that parties to labor agreements who wish to change working conditions first comply with the "detailed" procedures for notice, negotia-

tion, mediation, voluntary arbitration and conciliation set forth in the Act before resorting to self help. *Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969); *Elgin J. & E.R. Co. v. Burley*, 325 U.S. 711, 722-25 (1945).

This Court has held that the Act's status quo requirement is central to its design. *Detroit & T.S.L.R. Co. v. United Transportation Union*, 396 U.S. 142, 150 (1969) (*Shoreline*). The purpose of this requirement is to prevent a union from striking and a carrier from doing anything that would justify a strike. The status quo requirement delays the time when parties can resort to self help and provides procedures to foster agreement on issues that might otherwise lead to a disruption of commerce. *Shoreline*, 396 U.S. at 148-50. The "heart of the Railway Labor Act" is the duty to make every effort to reach consensual solutions to work place disputes. *Trainmen v. Jacksonville Terminal, supra*, 394 U.S. at 378.

CNW's argument is that, absent an independent finding of irreparable harm, a court has no power to enjoin violations of the status quo until there has been a final trial on a union's request for permanent injunction. In other words, the CNW asserts that it should be free to ignore the status quo provisions of the Act pending entry of permanent injunctive relief, unless a union can prove irreparable harm to it or its members. Of course, this formulation ignores the Congressional determination that failure of a carrier to maintain the status quo in itself threatens irreparable harm to both public and private interests.

While the Act does not contain any specific civil enforcement mechanisms, this Court realized immediately that, absent equitable relief to enforce compliance with the Act's obligations, the scheme of the RLA would be unworkable. This Court also recognized that Congress, in requiring collective bargaining and adherence to statutory procedures, had made a forceful declaration of the public interest. Thus, in *Virginian Ry. Co. v. System Federation 40*, 300 U.S. 515 (1937), the Court approved of the use of injunctive relief to enforce the mandates of

Section 2 Ninth of the Act, 45 U.S.C. 152 Ninth, that a carrier "treat with" the certified representative of its employees. The Court stated:

> In considering the propriety of the equitable relief granted here, we cannot ignore the judgment of Congress, deliberately expressed in legislation, that . . . the meeting of employers and employees at the conference table is a powerful aid to industrial peace.
>
> * * *
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> The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief.

300 U.S. at 551-52.

The Court distinguished an action for equitable enforcement of private rights from an action to enforce the statutory mandates of the RLA:

> More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern. That is testified to by the history of the legislation now before us, the reports of committees of Congress having the proposed legislation in charge, and by our common knowledge. Courts of equity may, and frequently do, go much farther both to give and withhold relief in the furtherance of the public interest than they are accustomed to go when only private interests are involved.

300 U.S. at 552.

Thus, the CNW's argument that the traditional equitable principles must be applied to actions for status quo injunctions is clearly misplaced. Congress has already balanced the equities in favor of maintaining the status quo.

In *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), the Court reviewed earlier cases, including *Vir-*

ginian Railway, which had held that injunctive relief was essential for effective enforcement of the Act's mandates. The Court stated:

> In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the "right" of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose.

320 U.S. at 300.

In *Shoreline, supra*, the Court affirmed an injunction requiring a carrier to maintain the status quo pending exhaustion of the procedural obligations of the Act. There is no indication in *Shoreline* that any showing beyond the existence of a major dispute and a violation of the status quo is required for entry of the injunction.

In *Chicago & N.W. Ry. Co. v. United Transportation Union*, 402 U.S. 570 (1971), the Court held that the *Norris-LaGuardia Act*, 29 U.S.C. §101 et seq., does not deprive federal courts of jurisdiction to enjoin a strike, even when the status quo procedures of the Act have been exhausted, if the carrier can show that the union had bargained in bad faith. In dissent, Justice Brennan, joined by Justices White, Douglas and Black, disagreed that an injunction could enter *after* the status quo provisions of the Act had been exhausted. But even the dissent did not dispute that injunctive relief was available when a party refused to initiate the Act's status quo procedures. The dissent reviewed *Virginia Railway* and *Shoreline* and stated:

> While in each of these instances the Court found specific, positive statutory mandates for judicial interference, the underlying cohesiveness of the decisions lies in the fact that in each instance the scheme of the Railway Labor Act could not begin to work without judicial involvement. That is, . . . unless the status quo

> was maintained during the entire range of bargaining, the statutory mechanism could not hope to induce a negotiated settlement.

402 U.S. at 595.

In this case, the CNW argues that there should be a hiatus in bargaining from the date a carrier unilaterally changes working conditions until the judicial process comes to a conclusion. During this hiatus, of course, carriers can raise various defenses, such as the CNW interposed seriatim here, to delay the judicial process. Obviously, CNW's position, if accepted, would undermine the federal labor policy set forth in the Act's status quo obligations. The Congressional mandate will be poorly served if a carrier's compliance with the Act comes only when its legal ingenuity is exhausted. The balance must fall on the side of bargaining, not litigation.

Because job loss, monetary damages or injury to union's status as bargaining representative do not necessarily constitute irreparable harm, a union attacking a unilateral change will often have a difficult time satisfying traditional equitable standards.[6] Of course, the CNW's argument that these standards apply completely misses the point. Congress has already "balanced the equities." It has determined that a refusal to bargain will adversely affect both public and private interests and that the disruptions to commerce resulting from unilateral changes in working conditions will cause serious public harm.

In order for the RLA to serve as an effective means of implementing Congressional intent, courts must have the power to enforce, by preliminary injunction, violations of the status quo without regard to traditional equitable standards. The mandatory duties imposed on the parties under the RLA reflect a specific Congressional determination that failure to comply with the Act's requirements is in itself an irreparable

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[6] *See e.g. Aluminum Workers v. Consolidated Aluminum Corp.*, 696 F.2d 437, 443-44 (6th Cir. 1982).

injury to both public (the danger of interruptions in commerce) and private (denial of employee rights to collectively bargain) interests which the Act is designed to preserve and protect.

The Eighth Circuit Court of Appeals has long recognized that, when a major dispute exists under the Railway Labor Act, preliminary injunctive relief does not depend on traditional standards applicable to private disputes. *Maintenance of Way Employees v. Burlington Northern R. Co.*, 802 F.2d 1016, 1020-21 (8th Cir. 1986); *Airline Pilots v. Northwest Airlines, Inc.*, 570 F.2d 257 (8th Cir. 1978); *United Transportation Union v. Burlington Northern, Inc.*, 458 F.2d 354, 357 (8th Cir. 1972). Each of these cases dealt with the question of the standard applicable to preliminary, rather than permanent, injunctions.

Other circuits have come to the same conclusion. In *Carbone v. Meserve*, 645 F.2d 96, 98 (1st Cir.), *cert. denied* 454 U.S. 859 (1981), the court stated that, when faced with a request for a preliminary injunction in a major dispute situation:

> A district court may enjoin either party from altering the status quo during the course of the negotiation proceedings with no showing of irreparable harm. (citation omitted).

In *Southern Ry. Co. v. Locomotive Engineers*, 337 F.2d 127, 134 (D.C. Cir. 1964), the court held that a finding of irreparable harm is not a requirement for a status quo injunction because "far more" is at stake "than the private rights and duties of the parties." The court noted that Section 6 rights, which are fundamental to the federal labor policy of preventing disruptions in commerce, are also involved. The court did not distinguish in any way between standards applicable to preliminary as opposed to permanent injunctions.

In *Seafarers v. Board of Trustees*, 351 F.2d 183 (5th Cir. 1965), the trial court reversed the lower court's denial of a preliminary injunction, noting that, when Section 6 rights have not been complied with, the union "and perhaps the National

Sovereign" become entitled to effective judicial relief so that national labor policy will be fulfilled. 351 F.2d at 190.

If the CNW's position were accepted, carriers could unilaterally implement changes and working conditions free from any judicial compulsion until the union could pursue the litigation to its conclusion. Such a situation would hardly maintain the status quo. It would award a carrier's intransigence and its ingenuity in concocting arguments to cloud the legal issues involved. Such a situation would also make compliance with the Act depend on the condition of a trial court's docket and its particularized view of what constitutes irreparable harm or a balance of the equities.

If quick effective injunctive relief is unavailable, the Congressional mandate that the status quo be maintained will be seriously jeopardized. If carriers could unilaterally change working conditions during the pendency of a lawsuit brought by the union with impunity, unions could retaliate by striking.[7] Any other result would give carriers an advantage not envisioned by the RLA. Moreover, such a situation is exactly what Congress intended to prevent by enacting the status quo requirement. *Shoreline, supra*, 396 U.S. at 150, 154. Unless a union can obtain immediate injunctive relief when a carrier makes a unilateral change in established working conditions, the collective bargaining process mandated by the Railway Labor Act will become unworkable.

The only case cited by the CNW as containing conflicting authority is the dicta in *Local 553, Transportation Workers v. Eastern Air Lines*, 695 F.2d 668 (2d Cir. 1982). There, a Second

[7]The irony is that the CNW would certainly argue that preliminary relief enjoining a strike is available without a showing of irreparable harm *to the CNW*. Because economic loss to an employer during a strike cannot constitute irreparable harm sufficient to obtain an injunction, the CNW would undoubtedly point to the harm to the public resulting from the interruptions to commerce. But, this is the irreparable harm that Congress has already factored into the status quo provision of the Act and it applies to requests for injunctive relief by either party.

Circuit panel did not address the issue in the context of the Congressional purpose reflected in the RLA's status quo requirement. In fact, the sole authority cited by the panel, *Jack Kahn Music Co. v. Baldwin*, 604 F.2d 755 (2d Cir. 1979), is *not* an RLA case. Instead, *Jack Kahn* was decided on the basis of the court's traditional and inherent equitable powers to grant injunctive relief. In *Jack Kahn*, the plaintiff sought relief under Section 16 of the Clayton Act, 15 U.S.C. §26, which is entitled "Injunctive Relief for Private Parties." That statutory provision expressly provides for preliminary injunctive relief:

> [u]nder the same conditions and principles as injunctive relief . . . is granted by court of equity, under the rules governing such proceedings, and upon . . . *a showing that the danger of irreparable loss or damages is immediate*. . . . (emphasis supplied).

In *Jack Kahn*, the court was required by statute to apply traditional equitable principles, including the requirement that irreparable harm be imminent. Here, by contrast, the RLA mandates that the status quo be preserved. The Clayton Act, upon which *Jack Kahn* is premised, is not authority that different standards should be applied to preliminary and permanent injunctions in any context, much less in the context of the Railway Labor Act.

The issues involved in determining whether an injunction should be granted when courts are exercising their traditional equitable powers is fundamentally different from the issues involved when a party invokes its statutory right to the preservation of the status quo pending compliance with the mandates of Section 6 of the RLA. *Virginian Railway, supra*, 300 U.S. at 552. Because the Second Circuit's decision in *Local 553, Transportation Workers v. Eastern Air Lines* was premised upon the erroneous assumption that the issues are identical, its decision is fatally flawed. In light of this flaw, it cannot be considered conflicting precedent with the long line of cases from the Eighth Circuit and other circuits.

This Court has long held that specific Congressional policies can be enforced by injunction without the traditional balancing of equities. In *United States v. San Francisco*, 310 U.S. 16 (1940), the Court held that the lower court's entry of an injunction restraining the City of San Francisco from violating a federal act granting it the use of Yosemite Park to generate electricity was proper even though the equities had not been balanced. The Court stated:

> [A]fter consideration of all these objections, we are satisfied that this case does not call for a balancing of equities or the invocation of the generalities of judicial maxims in order to determine whether the injunction should have issued. . . . The equitable doctrines relied on do not militate against the capacity of a court of equity as a proper forum in which to make a declared policy of Congress effective. Injunction to prohibit continued use—in violation of that policy—of property granted by the United States, and to enforce the grantee's covenants, is both appropriate and necessary. (citation omitted).

310 U.S. at 30-31.

In *TVA v. Hill*, 437 U.S. 153 (1978), the Court held that the district court had erred in balancing the quities in determining whether to enjoin the construction of a dam under the Endangered Species Act. The Court held that Congress had already struck the balance in favor of the endangered species and that injunctive relief was appropriate, and in that case required, when enforcement of that Congressional determination was sought. 437 U.S. at 194.

Of course, as this Court has stated, injunctive relief is not necessarily mandated when a person seeks to enforce Congressional policies. Thus, in *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), the Court held that injunctive relief was not absolutely required when there was a technical violation of statutory duties and no danger of recurrence. In *Hecht*, however, there was *no* indication that "balancing of equities" is a requirement

for injunctive relief to enforce statutory Congressional policy.. *Hecht* stands only for the proposition that courts of equity have discretion to withhold relief if, based on the facts, that relief would be ineffective or unnecessary.

In this case, the CNW openly has violated the Railway Labor Act by unilaterally implementing new terms and conditions of employment without first initiating and exhausting the mandatory notice, negotiation, mediation and conciliation procedures of the Act. The CNW has not ceased its violation of the Act. Instead, it continues to openly assert that it has no obligation to bargain with the BMWE. In such a situation, the *only* effective means of enforcing the Act's mandates is a status quo injunction.

To the extent that *Local 553, Transportation Workers v. Eastern Air Lines, supra,* departs from these principles, it was because the court never addressed the issue in terms of the Congressional mandate set forth in the status quo provisions of the RLA. Further, the panel's decision certainly does not reflect Second Circuit precedent in the area.

In *Security and Exchange Comm'n v. Management Dynamics, Inc.,* 515 F.2d 801 (2d Cir. 1975), an action for injunctive relief under the Securities Exchange Act of 1934, the court upheld a preliminary injunction despite the fact that the district court had not found irreparable harm or balanced the equities. The court rejected the argument that such findings were necessary:

> The appellants' crucial error on this score is their assumption that SEC enforcement actions seeking injunctions are governed by criteria identical to those which apply in private injunction suits.

515 F.2d at 808.

The court then reviewed with approval Second Circuit law where that principle had been applied in the context of both permanent and preliminary injunctions. 515 F.2d at 808.

In *United States v. Diapulse Corp.*, 457 F.2d 25, 28 (2d Cir. 1972), a case brought under the Food and Drug Act, the court stated that the passage of a federal statute is, in a sense, an implied finding that violations will harm the public and ought to be restrained if necessary without an independent showing of irreparable harm.[8]

The fact that drug use is involved does not put the issue in a different plane or remove it from the scope of collective bargaining.[9] Drug related issues have an immediate impact on employees. Here, the unilateral change permitted, for the first time, the dismissal of employees under Rule G for alleged off duty drug use. Issues such as this are of critical importance to unions in pursuing their statutory duty of representation. There are a myriad of issues concerning regulation of drug use by employees that can and must be addressed during collective

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[8]Other circuits have come to the same conclusion. *See, e.g., Security and Exchange Comm'n v. Youmans*, 729 F.2d 413, 415 (6th Cir. 1984); *Government of Virgin Islands v. Virgin Islands Paving, Inc.*, 714 F.2d 283, 286 (3d Cir. 1983); *Atchinson T. & S.F.Ry. Co. v. Lennen*, 640 F.2d 255, 259 (10th Cir. 1981); *Lathan v. Volpe*, 455 F.2d 1111, 1116 (9th Cir. 1971); *Shafer v. United States*, 229 F.2d 124 (4th Cir. 1956).

[9]In her Advice Memorandum CG87-5 of September 8, 1987, Rosemary M. Collyer, General Counsel for the National Labor Relations Board set forth her position that: (1) drug testing for employees and job applicants is a mandatory subject of bargaining under Section 8(d) of the National Labor Relations Act; (2) implementation of a drug testing program is a substantial change in working conditions even where physical examinations previously had been given and even if established work rules precluded the use of possessions of drugs in the plant; and (3) established Board policy that a union's waiver of its bargaining rights must be clear and unmistakeable will be applied to drug testing. The CNW's argument that it has an absolute right to change its work rules with respect to drug use is diametrically opposed to the position of the Board's General Counsel. If CNW's argument were accepted, there would be two completely different standards applied under the two labor Acts. *See also Locomotive Engineers v. Burlington Northern R. Co.*, — *F.2d* —, No. 85-4137, (9th Cir., Feb. 11, 1988) (RLA requires parties to bargain over any proposal whose primary impact is the potential loss of jobs, i.e., drug testing).

bargaining so that the interests of the parties and the public can be served.

The CNW's argues that, because the Federal Railroad Administration had recognized the dangers of employee drug use and has imposed certain regulations regarding drug testing, it has no obligation to bargain with respect to drug rules and policies. This argument simply proves too much. While Congress and administrative agencies can remove certain issues from the sphere of bargaining, the ones that remain are for the parties to negotiate. If Congress had decided to preempt the field in this area in the public interest, it would have done so. The areas that are left unregulated are for mutual adjustment by the parties through collective bargaining.

The CNW cannot assume the mantle from Congress as the public's protector, especially at the expense of the bargaining rights of employees. Further, the CNW is absolutely wrong when it states that the Eighth Circuit left the public interest out of the equation. Congress has already decided that negotation between carriers and unions concerning working conditions is in the best interest of the public. *Telegraphers v. Chicago & N.Y. Ry. Co.*, 362 U.S. 330, 338 (1960). As this Court stated in another context in *Secretary of Interior v. California*, 464 U.S. 312, 342 (1984):

The choice between these policy arguments is not ours to make, it has already been made by Congress.

In the face of the CNW's mechanical invocation of the spectre of "irreparable" harm to the public if it is not permitted to violate the Railway Labor Act, it is important to understand the scope of the lower court's injunction and the CNW's position there. The lower court did not enjoin the CNW from enforcing its existing work rules. To the contrary, it specifically held that the CNW could enforce its pre-existing Rule G or any other rule that might be applicable to employee drug use. The CNW is simply required to operate under the working conditions which have been in effect for years with the

agreement and acquiescence of the unions. The CNW lost none of the rights it had prior to its April 26, 1987 implementation of Rule G.

Further, the CNW's arguments before the trial court and the Court of Appeals demonstrate the disengenuous nature of its position. One of CNW's defenses (first raised in its Motion for Reconsideration) is that the new Rule G was simply a "procedural" clarification of its existing Rule 7.[10] If this were true, the injunction would have no effect whatsoever on the CNW's ability to police drug usage of its employees. The CNW cannot have it both ways. It cannot say that it already had the right under Rule 7 to do what it did and then say that irreparable harm may occur if it is enjoined from changing its rules.

The CNW also states that it has been restrained for a year and one half from implementing the new Rule G. In fact, it has only been restrained from enforcing the new Rule G pending the exhaustion of Section 6 procedures. During that year and one half, of course, the CNW could have bargained with the BMWE regarding the propriety of such a rule. Instead, the CNW has steadfastly refused to bargain and has not even attempted to initiate the Section 6 procedures. If the CNW had bargained in good faith with the BMWE, its concerns and the concerns of the BMWE might have been accommodated long before now. Moreover, the CNW might have exhausted those procedures by this time, and had negotiations failed, it would have had the right to unilaterally implement a rule, subject of course, to the BMWE's right to use its economic leverage.

Until Congress sees fit to remove particular subjects from the sphere of collective bargaining, the public interest will be

[10] The Court of Appeals correctly rejected this argument on three independent grounds, one of which was that Rule 7 had a specific requirement that an employee's conduct reflect adversely on the railroad. *See*, 827 F.2d at 335-36.

served by requiring adherence to the mandatory requirements of the Railway Labor Act. Congress has already balanced the equities and has, by statute, determined that irreparable harm will result unless there is compliance with the status quo provisions of the Act. Neither the lower court nor the Eighth Circuit erred in determining that a status quo injunction was appropriate in this case.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

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